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Office of Administrative Law Judges
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Issue Date: 29 July 2004

CASE NO.: 2003-LHC-2536

OWCP NO.: 07-161435

IN THE MATTER OF:

LOUIS CURT PANNAGL,
Claimant

v.

BASS ENTERPRISES PRODUCTION,
Employer

and

RELIANCE NATIONAL INDEMNITY CO.,
Carrier

Appearances:

W. Patrick Klotz, Esq.
On behalf of Claimant

Thomas W. Thorne, Esq.
On behalf of Employer/Carrier

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, et seq., brought by Louis Pannagl (Claimant) against Bass Enterprises Production (Employer) and Reliance National Indemnity Co. (Carrier). The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for a formal hearing. A hearing before the undersigned was held on June 7, 2004, in Metairie, Louisiana.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Claimant testified, called Dr. Broussard, as well as R.A. Toups, Michael Rodriguez, Charles Henry and James Martin as hostile witnesses. Claimant introduced 5 exhibits which were admitted, including medical reports of Dr. Broussard, audiogram report from Dr. Worley, answers to interrogatories, Claimant's pre-employment physical form, Claimant's earning statement from Employer.[1] Employer called Dr. Seidemann and introduced 5 exhibits, two of which were admitted into evidence, including Dr. Seidemann's August, 2002, report and a portion of Claimant's deposition used for impeachment purposes.[2]

The parties elected not to submit post-hearing briefs. Based upon the stipulations of the parties, the evidence introduced, my observation of the witness demeanor, and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. Audiograms were performed on June 29, 2001, September 4, 2001, and August 12, 2002;

2. Claimant became aware of a relationship between his hearing loss and his employment on June 29, 2001;

3. Employer was advised of the hearing loss on September 19, 2001;

4. Employer filed a Notice of Controversion on September 19, 2001;

5. An informal conference was held on July 2, 2002;

6. Employee was fired from his employment; and

7. Employee's applicable average weekly wage is $818.75.

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[1] References to the transcript and exhibits are as follows: trial transcript- Tr.__; Claimant's exhibits- CX-__, p.__; Employer exhibits- EX-__, p.__; Administrative Law Judge exhibits- ALJX-__; p.___.

[2] Exhibits 1a, 1b, 2b, 2c, 3a and 3b were excluded from evidence as untimely.

II. ISSUES

The following unresolved issues were presented by the parties:

1. Maritime status;

2. Causation of hearing loss;

3. Last employer;

4. Entitlement to compensation benefits; and

5. Medical benefits.

III. STATEMENT OF THE CASE

A. Chronology:

Claimant worked for Employer from 1984 until 2000. He was first employed as a roustabout on a moveable barge in the Cox Bay field. At this location he was allegedly exposed to many loud noises from the generators and cherry pickers located on the barges. In the mid- to late-nineties he was transferred to the Pointe a La Hache field where he was a roustabout and then a gas lift specialist. As a gas lift specialist, Claimant spent about 4 hours per day on a boat traveling to and from the fixed platform, as well as out to the various wellheads he was required to check and test. Claimant's employment was terminated in April, 2000.

In 2001, Claimant sought medical treatment from Dr. Worley and Dr. Broussard for a hearing loss problem. His pre-employment physical at Employer, performed in 1984, indicated he had "good hearing." However, two audiograms performed in 2001 revealed significant hearing loss which was worse in the right ear. A 2002 audiogram performed by Dr. Seidemann, Employer's audiologist, revealed similar asymmetric hearing loss.

B. Claimant's Testimony

Claimant is a college graduate currently residing in Braithwaite, Louisiana. He worked at Employer for sixteen years, from 1984 until April, 2000. Claimant worked at Employer's Cox Bay facility for eight years as a roustabout, working on barges and repairing flow lines to

maintain the field. His supervisors were Tony Ventrua and Enos Domangue; Mike Rodriguez was the safety man. Claimant spent a few years on a wireline barge between Employer's Cox Bay and Point a La Hache Fields before being transferred to Point a La Hache as a roustabout. In the last three years of his employment, Claimant was promoted to gas lift specialist, assisting the gauger and maintaining the pilots and setting on the wellheads. His supervisor was Jimmy Martin. (Tr. 35-38).

Claimant testified that his work as gas lift specialist required him to operate a 22-foot aluminum boat, *MR. DAVE*, to go to the various wells to check the pressures and the pilots. He spent approximately 4 hours per day on the boat and used it to perform some of his duties at the wellheads. Claimant further testified the *MR. DAVE* was a loud boat; to not waste time it was run "wide open" and a bent wheel or shaft would cause vibration and additional loudness. Claimant stated the inboard 350 Chevrolet motor was located in the rear, behind the driver's seat. Claimant sat on the left side of the boat, therefore the noise exposure was greater to his right ear. (Tr. 38-40). Claimant testified he was also exposed to additional noise at the wellheads and pipelines; he was required to bleed and blow ice from the pipelines while working from his boat. In the winter he would assist in bleeding the lines, which were blown to get the ice out. He explained that when the needle valves were opened to bleed a line, "it's like a jet engine taking off." (Tr. 40-41).

On cross-examination, Claimant clarified that his hearing problems began prior to his work on the *MR. DAVE*. His initial job as a roustabout involved working on a loud, moveable barge. The machines used on the barge included two 671 GMs, and Claimant also operated a cherry picker which has a 453, 653 or 671 GM diesel engine. The cherry pickers and generators on the production platform were loud and Claimant was exposed to them on a daily basis in the course of his employment. Claimant testified he occasionally worked in the compressor plant for 8-10 hours a day when they had to repair an engine, which took about one week. The plant had "three big Clarks and a Caterpillar" which were so loud the employees had to scream to hear each other. However, he testified that 90% of his work at Employer was performed on boats, barges and moveable platforms, all located on navigable waterways. (Tr. 41-42, 46, 50).

Claimant testified on cross that he used the boat for transportation, as well as for making lines on the barge and fixing risers. (Tr. 52-53). While at the Pointe a La Hache field, he would stay on the boat all day while working on the barges. On average, Claimant spent four hours per day on a boat; he worked 5 days per week. He did most of his paperwork on the boat as he completed his jobs. Some of his duties required him to go onto the platform, but Claimant also performed work, such as rebuilding pilots, on the boat. (Tr. 54-56).

Claimant testified the production platforms had loud generators and cranes, and were stationery in the water. The compressor station, the loudest environment, was on land, although at the Cox Bay Field it was only accessible by boat. Claimant explained he was only in the Pointe a La Hache compressor station a few times. Claimant further testified he visited the approximately 20 wellheads in the water several time per week; Employer had 4 wellheads on land but Claimant only visited them occasionally. (Tr. 62-66).

Claimant was provided a set of disposable earplugs his first day on the job with Employer, but he testified ear protection was not offered at any other time and he did not receive instructions on wearing ear protection until the 1997 or 1998, toward the end of his career. At his 1984 pre-employment physical, Claimant's hearing was tested and found to be normal. Although, he could not recall if an audiogram was performed at this physical. In 2001, Claimant contacted Dr. Broussard who performed an audiogram and informed Claimant he needed hearing aids. Claimant informed Employer, but they have not provided him hearing aids, medical benefits or worker's compensation benefits. (Tr. 42-46, 75).

Claimant testified he currently works as an oyster broker, and while his hearing aid does not affect one-on-one conversations, it does limit his ability to hear in a group of people. He earns enough money as a broker to pay his bills, and to afford a hearing aid he would have to cut back on another living expense. (Tr. 47-49).

On cross-examination, Claimant testified he owns a 12-gauge shotgun and has hunted ducks on fewer than 10 occasions. He also used to water-ski. Claimant also personally bought three oyster luggers, each with a 671 motor which is located in the back of the boat underneath the cabin with an insulated exhaust. Claimant clarified he does not operate the boats himself; when he goes out to check the crews and oyster beds he uses his speed hull, outboard motor, to get to the oyster luggers. However, he does not usually go into the cabin of his boats, or anywhere near the engine room. Claimant testified that in comparison, the oyster luggers are quieter than the *MR. DAVE*, the work barges and the compressor station. (Tr. 81-83, 88-89). Claimant further testified he has been an oyster broker and an owner of oyster boats the entire time he was at Employer, including the years since 2000. (Tr. 84-85).

On rebuttal, Claimant testified he has never had viral or bacterial meningitis or any illness which affected his hearing in any way. Additionally, he does not have a family history of hearing loss. On the few occasions he hunted, he wore earplugs. (Tr. 160-61).

C. R. A. Toups

Mr. Toups has been with Employer for 25 years; his office is in Metairie, Louisiana, but he is in charge of the Cox Bay and Pointe a La Hache fields. He testified he only went into the field on special causes. Mr. Toups testified he had no actual knowledge of how many hours per day Claimant spent on a boat. He further stated there was no OSHA-regulated audiological survey of the entirety of Employer's equipment and workplaces, although he opined some things were randomly tested during the course of OSHA-compliance training. Employer did not conduct annual surveys of the workplace noise levels. (Tr. 110-14). Mr. Toups testified every employee was provided hearing protection when the noise exposure was greater than 90 decibels. However, as he worked in the New Orleans office he was not aware of how available the protection was made; that was something the safety man or production foremen were in charge of. (Tr. 114).

D. Michael J. Rodriguez

Mr. Rodriguez worked at Employer from 1976 until 2000 as a switcher at the Pointe a La Hache field, but he also performed the functions of safety man. He was eventually appointed to be the safety man at the Cox Bay field, although Mr. Rodriguez testified the only training he received was a safety manual given all employees. (Tr. 115-17).

Mr. Rodriguez testified that from 1984 to the mid-nineties, during the years Claimant worked with him at Cox Bay, hearing protection was not offered the employees. He explained the main safety concern was for hard-hats and safety-toed shoes; hearing protection was not heavily stressed. Mr. Rodriguez testified Employer only began stressing safety at the Cox Bay field after Enos Domangue was brought on in the early to mid-nineties. (Tr. 118-19). Mr. Rodriguez further testified there were lots of loud noises out in the field which justified the need for hearing protection. He stated some boats were louder than others, the compressor plant was very loud, the platforms had equipment and engines constantly running, and bleeding the lines was ear-piercing work. OSHA had conducted some noise testing in the compressor plant in the 1980s or early 1990s, but it was before the caterpillar engine was in place and it was only one test. Mr. Rodriguez testified annual audiograms were never ordered for the employees. (Tr. 119-121).

E. Charles Henry

Mr. Henry is a geologist, but worked summers at Employer from 1986 to 1991. He worked with Claimant at Cox Bay; Mr. Henry performed odd jobs including laying pipe and working in the compressor station. He testified Employer never offered him hearing protection, although the generators, compressor stations and lawn mowers made for a lot of noise in the workplace. (Tr. 121-23).

Mr. Henry further testified he was familiar with OSHA rules and regulations, as well as environmental phase one and two, as he used to work as an environmental geologist performing phase one and two audits. Based on that experience, he testified the Cox Bay field was a job site which required OSHA audiological testing. Mr. Henry was not aware of any such testing being done at Employer. (Tr. 123).

F. James Martin

Mr. Martin worked at Employer for 28 years, and was the production foreman at the Pointe a La Hache field; he was Claimant's direct supervisor. Mr. Martin testified Claimant was

assigned to the *MR. DAVE* which was a loud boat. He further testified the engines on the work barges were loud, as were the compressor plant and cherry pickers. Mr. Martin testified the employees were offered hearing protection because of these loud noises in the workplace, although he was not aware of OSHA performing any noise testing. (Tr. 124-26).

Mr. Martin testified he remembered having one PENSCO safety program, although he did not recall when it was. He also testified there were refresher courses offered, and that Claimant attended at least one of them. (Tr. 126-27). However, on cross-examination, Mr. Martin acknowledged Employer's safety manual required ear protection in the form of ear-muffs or earplugs in areas of high noise levels, above 90 decibels, and when bleeding lines. Mr. Martin testified earplugs and muffs were available at the Pointe a La Hache field office, on some of the barges and in the compressor station. He further testified employees generally congregated in the coffee room before or after a shift, but not in the office where the ear protection was stored. Some of the employees requested ear plugs from him. (Tr. 129-31).Mr. Martin testified every employee was given a copy of the safety manual, but the book shown to him at the hearing was dated 1993 and he did not know if Claimant received a copy of it. He personally did not provide Claimant a copy of the manual when he was transferred to Pointe a La Hache. (Tr. 135-36).

Mr. Martin further testified Employer had 30-40 wellheads scattered throughout the Pointe a La Hache field, with 20 currently producing. He explained a wellhead is a set of valves controlling the safety and flow of the oil coming out of the pipes. The wellheads located on the water were approximately five feet wide and fifteen to twenty feet long, with the well situated in the center of the mini-platform. (Tr. 131-33). The production platforms were 120 feet long by 50 feet wide, concrete, double-decker platforms with the production equipment, including separators, heater treaters, generators and crane, located on the upper deck. The lower deck was mostly water treating and temporary oil storage. As an oil specialist, Claimant could spend all day on the platforms proving meters and testing pilots. He was assigned to a boat to get from the dock to the platform, and then to the various wellheads he was required to check. Mr. Martin testified Claimant was on his own at the wellheads, and he could not say how exactly he performed his job. (Tr. 133-34, 136).

G. J. Vance Broussard, M.D.

Dr. Broussard, an ear, nose and throat specialist, was accepted by the court as an expert. He first examined Claimant in September, 2001, at which time Claimant presented with a hearing loss problem. Dr. Broussard performed an audiogram and also reviewed a previous audiogram performed by Dr. Worley. The results indicated Claimant had mild sloping to moderately severe hearing loss affecting both ears. The hearing loss was worse in the high frequencies and had a notched pattern, that is, it sloped downward and then turned back upward. And those audiometric results are very consistent with hearing loss related to noise exposure. (Tr. 93-95). Dr. Broussard further determined there was slight to moderate asymmetry, with Claimant's hearing being worse in his right ear. He testified an audiologist assigned an AMA-

based percentage hearing disability, and opined Claimant would benefit from the use of hearing aids in both ears. (Tr. 95-96).

Dr. Broussard testified age-related hearing loss would produce different audiogram results with some sloping, but no notching as was present on Claimant's audiograms. Furthermore, age-related hearing loss generally gets progressively worse over time whereas noise-induced hearing loss stabilizes. Dr. Broussard testified the 2001 audiogram performed by Dr. Worley and the audiogram Dr. Seidemann performed almost exactly one year later did not reveal a worsening of Claimant's hearing, but were "relatively stable." Additionally, age-related hearing loss of this degree is uncommon in someone 41 years of age; it occurs more often in those 60 years or older. (Tr. 97-98, 107). Dr. Broussard indicated congenital hearing loss does not generally show up in people in their 30's or early 40's. He opined it would be difficult to come up with another plausible explanation for Claimant's hearing loss aside from toxic noise exposure. (Tr. 107-08).

Dr. Broussard opined that Employer's offer of hearing protection to its employees may constitute acknowledgement of toxic noise exposure in the workplace. He testified he had some knowledge of OSHA regulations, and explained that the simple offer of hearing protection was not adequate for hearing conservation. Generally, the Employer would be required to conduct annual noise assessments, provide for annual audiograms of its employees, make reasonable engineering modifications to reduce noise, and refer employees for medical consultation if there is a change in hearing of ten or more decibels. Further, OSHA recommends hearing protection at 85 decibels for an eight-hour period, and requires such protection at 90 decibels. Dr. Broussard testified Claimant's description of the compressor station where employees had to yell to hear each other when standing face-to-face, represented noise levels up around 130 decibels. (Tr. 98-101). Dr. Broussard testified that with 98-99% certainty, Claimant's hearing loss was the result of toxic noise exposure. He testified to a reasonable medical probability that the *MR. DAVE*, compressor station and cherry pickers were all contributing factors to Claimant's toxic noise exposure, despite not having tested their actual noise levels. (Tr. 103, 108).

On cross-examination, Dr. Broussard testified hearing loss is generally measured by the intensity and duration of the noise. At the initial interview with Claimant, he inquired into other possible sources of noise exposure, which revealed minimal recreation exposure and hunting less than one time per year. Dr. Broussard noted Claimant shoots with his right-hand, which would typically result in greater hearing loss in his left ear, if at all. (Tr. 103-06).

H. Michael Seidemann, Ph.D.

Dr. Seidemann possesses a Masters and Ph.D. degree in the field of audiology. He taught medical and graduate students in audiology and ear, nose and throat residents at Tulane and LSU Medical Schools. For the past 16 years he has been in a solo private practice limited to forensic and industrial audiology. He was accepted by the court as an expert in the field of audiology. (Tr. 138-44).

Dr. Seidemann was provided the audiological tests performed by Drs. French and Broussard, and was asked by Employer to examine Claimant in August, 2002. Dr. Seidemann testified that at the examination, Claimant reported hearing difficulties dating back 5 years, or approximately 1997. Claimant indicated his hearing loss had been gradual and symmetrical, although Dr. Seidemann testified the tests indicated otherwise. Claimant reported no history of prior ear disease, ear surgery, dizziness or vertigo, tinnitus or ringing in the ears and a negative history of other medical conditions which could be related to his current hearing loss. (Tr. 144-46). The remainder of Claimant's history provided to Dr. Seidemann at the initial interview was consistent with his testimony, *supra*.

Audiological tests performed by Dr. Seidemann indicated Claimant's hearing loss stemmed from his inner ear. In his right ear, Claimant's hearing was normal in low to middle frequencies, but his hearing loss was mild to moderate at higher frequencies. In his left ear, Claimant was within normal range in low and the two highest frequencies, with mild to moderate hearing loss in the middle frequencies. Dr. Seidemann testified these results demonstrate a more severe hearing loss in Claimant's right ear than in his left ear. (Tr. 146-48). He further testified that in light of the asymmetry of Claimant's hearing loss, he did not feel it was caused by workplace noise exposure. Dr. Seidemann elaborated that the fact Claimant worked at a site with loud noise was not sufficient to establish the cause of his hearing loss. To be more definitive concerning the relationship between Claimant's hearing loss and work environment, Dr. Seidemann requested the opportunity to conduct sound level measurements at the workplace. However, at the hearing he testified there was no relationship between Claimant's hearing loss and his work environment. (Tr. 149-51).

Dr. Seidemann explained the notching in Claimant's audiograms was not typical of noise induced hearing loss. Other pathologies which could have caused Claimant's hearing loss include hereditary hearing loss, aging, viral causes and some bacterial causes. Based on Dr. Seidemann's personal knowledge of the noise levels at Employer, he did not feel an OSHA-regulated hearing conservation program was required. He further testified a 12-gauge shotgun fires at 140-145 decibels. (Tr. 152-54).

On cross-examination, Dr. Seidemann testified he did not know what caused Claimant's hearing loss. He was not familiar with the noise levels of Employer's cherry pickers or compressor station, and could not opine as to whether they contributed to Claimant's hearing loss. Furthermore, Dr. Seidemann did not visit Employer's Cox Bay field, and thus had no personal knowledge of the noise levels there, and whether they could have contributed to Claimant's hearing loss. (Tr. 155-57). Dr. Seidemann further testified although Claimant stated his hearing loss dated back to 1997, there was nothing to indicate he did not lose his hearing before that time. As there was no audiogram performed in connection with the pre-employment physical, the precise level of Claimant's hearing range twenty years ago was not known. (Tr. 158-59).

IV. DISCUSSION

A. Contentions of the Parties

Employer contends Claimant is not entitled to coverage under the Act, as he was not engaged in marine employment. It argues Claimant failed to establish his injury occurred while loading or unloading from a fixed platform, or while operating a boat. As such, he lacks maritime status per Section 2(3) of the Act and is not entitled to recover disability benefits. Furthermore, Employer contends there is un contradicted audiological testimony that Claimant's hearing loss was not caused by workplace noise exposure.

Claimant contends he enjoys marine status, and thus coverage under the Act, as he worked on navigable waters 90% of the time. Specifically, he spent 12 years working on a moveable barge in Cox Bay, bled wellhead lines located in the marshes and canals, and used a boat to travel to and from, as well as perform work at, the various wellheads. Additionally, as there is un-refuted medical testimony that the workplace noise exposure probably caused Claimant's hearing loss, Claimant is entitled to disability benefits.

B. Jurisdiction

In order to successfully claim benefits under the Act a worker must satisfy both the "status" and the "situs" test. *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 415-16, (1985). In other words, a worker must be "engaged in maritime employment," 33 U.S.C. § 902(3), and he must have been injured "upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)," 33 U.S.C. § 903(a). *See Munguia v. Chevron U.S.A., Inc.*, 999 F.2d 808, 810 (5th Cir. 1993).

Situs

Coverage under Section 3(a) is determined by the nature of the place of work at the moment of injury. *See Nelson v. Gray F. Atkinson Constr. Co*., 29 BRBS 39 (1995), *aff'd sub nom. Nelson v. Director, OWCP*, 101 F.3d 706 (9th Cir. 1996). In this case, situs is not an issue. Claimant's alleged injury occurred over navigable waterways in Cox Bay and Pointe a La Hache. The only jurisdictional issue is that of maritime status.

Status

Employer in this case has argued that Claimant is not a covered employee within the meaning of the Act, as he does not meet the status requirement. Section 2(3) of the Act defines "employee" in part as follows:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaking, but such term does **not** include–(B) individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet . . . if [such individuals] are subject to coverage under a State workers' compensation law.

33 U.S.C. § 902(3)(B) (emphasis added). A claimant can satisfy the status requirement if the claimant's work constitutes "maritime employment," or as established by *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 97 S. Ct. 2348 (1977), and *Boudloche v. Howard Trucking Co., Inc*., 632 F.2d 1346 (5th Cir. 1980), if the claimant spends at least "some portion" of his time performing indisputably longshoring activities.

In *Herb's Welding Inc. v. Gray*, the Supreme Court held that a welder injured while working on a fixed oil production platform in state waters was not engaged in maritime employment. 470 U.S. 414, 425-27 (1985). However, the Court was faced with an employee who spent nearly all of his working hours on the fixed platform, including eating and sleeping, and was on navigable waters only fortuitously during his travels to and from the platform. The Court noted there was "a substantial difference between a worker performing a set of tasks requiring him to be both on and off navigable waters, and a worker whose job is entirely land-based but who takes a boat to work." *Id.* at 427 n.13. The Fifth Circuit recently interpreted the decision in *Herb's Welding* to stand for the proposition that a claimant meets the status test if his "presence on the water at the time of injury was neither transient or fortuitous." *Bienvenu v. Texaco Inc.,* 164 F.3d 901, 908 (5th Cir. 1999). Specifically, the presence "of a worker injured on the water and who performs a 'not insubstantial' amount of his work on navigable waters is neither transient nor fortuitous." *Id.*

Additionally, apparently recognizing potential factual variations, the Supreme Court in *Herb's Welding* did not address the status of a worker who spent a substantial period of his time working on drilling vessels on navigable waters, rather than fixed platforms, but added in a footnote:

> Offshore rigs are of two general sorts: fixed and floating. Floating structures have been treated as vessels by the lower courts. Workers on them, unlike workers on fixed platforms, enjoy the same remedies as workers on ships. If permanently attached to the vessel as crew members, they are regarded as seamen; if not, they are covered by the LHWCA because they are employed on navigable waters.

470 U.S. at 416 n.2.

In the present case, Claimant was clearly engaged in maritime employment and his presence on navigable waters was neither transient nor fortuitous. For 12 years he worked as a roustabout on a moveable barge in Cox Bay. Then, during his time at Pointe a La Hache Claimant worked as a roustabout and as a gas light specialist. The latter job required him to spend 4 hours per day operating the *MR. DAVE* to get from the dock to the platform, as well as to travel to the various wellheads for testing. Additionally, Claimant was responsible for bleeding

pipelines. Claimant testified he repaired equipment, completed paperwork and even bled the lines from his boat, the *MR. DAVE*.[3] His job was traditional maritime employment and he thus enjoys coverage under the Act.

C. Causation

(1) The Section 20(a) Presumption - Establishing a *Prima Facie* Case

Section 20 provides that "[i]n any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary - - (a) that the claim comes within the provisions of this Act." 33 U.S.C. § 920(a). To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that: (1) the claimant sustained a physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused, aggravated, or accelerated the harm or pain. *Port Cooper/T. Smith Stevedoring Co., Inc., v. Hunter*, 227 F.3d 285, 287 (5th Cir. 2000); *O'Kelly v. Department of the Army*, 34 BRBS 39, 40 (2000); *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129 (1984).

Once this *prima facie* case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. *Hunter*, 227 F.3d at 287. "[T]he mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." *U.S. Industries/Federal Sheet Metal Inc., v. Director*, *OWCP*, 455 U.S. 608 (1982). *See also Bludworth Shipyard Inc., v. Lira*, 700 F.2d 1046, 1049 (5th Cir. 1983)(stating that a claimant must allege an injury arising out of and in the course and scope of employment); *Devine v. Atlantic Container Lines*, 25 BRBS 15, 19 (1990)(finding the mere existence of an injury is insufficient to shift the burden of proof to the employer).

In the present case, the parties agreed Claimant suffers an 18.4% hearing loss. Claimant contends this hearing loss is a result of his exposure to toxic noise levels in the workplace. Dr. Broussard, an ear nose and throat specialist, testified Claimant's hearing loss was noise induced, and more likely than not related to his employment. Claimant credibly testified he was exposed to loud generators and cherry pickers on the barge in Cox Bay, as well as excessive noise in the compressor station at that site. This was supported by the testimony of Mr. Rodriguez and Mr. Henry, who both stated the generators, cherry pickers and compressor station made for a lot of noise which would justify the need for hearing protection and OSHA regulation. Additionally, Mr. Rodriguez testified that bleeding the well-lines was "ear piercing work."

[3] Employer attempted to impeach Claimant by introducing the transcript of his deposition into evidence, wherein Claimant stated he only used the boat to travel between platforms and did not perform any work on it. In reviewing the evidence and comparing the testimonies, I do not find Claimant intentionally misled the parties or the court in his deposition and find the totally of his testimony to be credible.

Claimant and Mr. Henry further testified Employer did not provide ear protection at Cox Bay, and that OSHA did not conduct regular noise testing at that site. Mr. Rodriguez, Employer's safety man at Cox Bay, corroborated this statement in testifying that Employer did not offer ear protection to its employees until the mid-nineties, when Enos Domangue was hired. He added that while OSHA had done some random testing of noise levels, it did not perform thorough tests on an annual, or otherwise regular, basis.

Claimant also testified he was exposed to loud noises from the inboard engine on the *MR. DAVE*, the boat he was required to use at the Pointe a La Hache field to get to the platform and drive around to the wellheads. His testimony that he sat next to the motor on its left side was consistent with the greater loss of hearing in his right ear. Mr. Martin stated the *MR. DAVE* was a loud boat, and Claimant could be out on it all day to test the different wellheads. Further, both Claimant and Mr. Martin testified the work barges, compressor plant and cherry pickers at the Pointe a La Hache field produced a lot of noise.

Based on the foregoing, I find Claimant has established a *prima facie* case that his exposure to loud noise in the workplace could have caused his hearing loss, sufficient to invoke the Section 20(a) presumption.

(2) Rebuttal of the Presumption

"Once the presumption in Section 20(a) is invoked, the burden shifts to the employer to rebut it through facts - not mere speculation - that the harm was not work-related." *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 687-88 (5th Cir. 1999). Thus, once the presumption applies, the relevant inquiry is whether the employer has succeeded in establishing the lack of a causal nexus. *Gooden v. Director, OWCP*, 135 F.3d 1066, 1068 (5th Cir. 1998); *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84, 89-90 (1995)(failing to rebut presumption through medical evidence that claimant suffered an prior, unquantifiable hearing loss); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144-45 (1990)(finding testimony of a discredited doctor insufficient to rebut the presumption); *Dower v. General Dynamics Corp.*, 14 BRBS 324, 326-28 (1981)(finding a physician's opinion based of a misreading of a medical table insufficient to rebut the presumption). The Fifth Circuit further elaborated:

> [t]o rebut this presumption of causation, the employer was required to present substantial evidence that the injury was not caused by the employment. When an employer offers sufficient evidence to rebut the presumption--the kind of evidence a reasonable mind might accept as adequate to support a conclusion--only then is the presumption overcome; once the presumption is rebutted it no longer affects the outcome of the case.

Noble Drilling v. Drake, 795 F.2d 478, 481 (5th Cir. 1986)(emphasis in original). *See also, Orto Contractors, Inc. v. Charpentier*, 332 F.3d 283, 290 (5th Cir. 2003) *cert. denied* 124 S.Ct. 825 (Dec. 1, 2003)(stating that the requirement is less demanding than the preponderance of the evidence standard); *Conoco, Inc.*, 194 F.3d at 690 (stating that the hurdle is far lower than a "ruling out" standard); *Stevens v. Todd Pacific Shipyards Corp.*, 14 BRBS 626, 628 (1982),

aff'd mem., 722 F.2d 747 (9th Cir. 1983) (stating that the employer need only introduce medical testimony or other evidence controverting the existence of a causal relationship and need not necessarily prove another agency of causation to rebut the presumption of Section 20(a) of the Act); *Holmes v. Universal Maritime Serv. Corp.*, 29 BRBS 18, 20 (1995) (stating that the "unequivocal testimony of a physician that no relationship exists between the injury and claimant's employment is sufficient to rebut the presumption.").

In the present case, Employer contends the testimony of Dr. Seidemann that Claimant's hearing loss was not related to his workplace exposure to noise is sufficient to rebut the presumption. I disagree. Dr. Seidemann performed an audiogram in 2002, which revealed an asymmetrical loss of hearing which was significantly greater in Claimant's right ear. Dr. Seidemann testified the asymmetrical nature of Claimant's hearing loss indicated it was not noise related. However, he did not comment on the fact Claimant spent approximately four hours a day next to an inboard motor engine, consistent with more noise exposure to his right ear.

Further, Dr. Seidemann opined the noise levels at Claimant's workplace were not sufficient to cause his hearing loss. However, Dr. Seidemann also testified he was not familiar with the noise levels of the compressor station or cherry pickers at the Pointe a La Hache field, and could not comment on whether they contributed to the loss of hearing. Similarly, Dr. Seidemann was not familiar with the noise levels at Employer's Cox Bay field, where Claimant worked for twelve (12) years. As there was no audiogram performed prior to 2001, Dr. Seidemann could not pin-point when Claimant began to lose his hearing, and could not deny the possibility Claimant's hearing loss began while he was employed at Cox Bay. Finally, Dr. Seidemann testified Claimant's hearing loss could have been the result of age, hereditary factors, virus, or bacterial causes. However, he noted Claimant did not report to him any medical condition which could be related to his current hearing loss.

Thus, as Dr. Seidemann did not have any personal knowledge of the noise levels at Employer's Cox Bay facility or a complete knowledge of the noise levels at the Pointe a La Hache field, I find he could not reasonably or rationally conclude that Claimant's hearing loss was not related to workplace noise levels. As such, I find Dr. Seidemann's testimony is not sufficiently substantial or unequivocal to rebut the Section 20(a) presumption.

In the alternative, if Employer had successfully rebutted the presumption, I find the preponderance of the evidence weighs in favor of the Claimant. As Dr. Seidemann did not have a rational basis for his opinions, I give more weight to the testimony and opinions of Dr. Broussard that Claimant's hearing loss was work-related. Additionally, Employer did not even cross-examine the hostile witnesses who testified as to the loudness of the Cox Bay and Pointe a La Hache fields. Thus, Claimant's hearing loss constitutes a compensable injury under the Act.

In conclusion, I find Claimant is a covered employee engaged in traditional maritime employment at both Employer's Cox Bay and Pointe a La Hache fields. Employer failed to produce substantial evidence to rebut Claimant's *prima facie* case of a causal connection between his hearing loss and exposure to toxic noises in the workplace. I conclude that Claimant has suffered a compensable injury under the Act, for which he is entitled to disability compensation.

Thus, I find Claimant is entitled to disability benefits under the Act based on an agreed 18.4% loss of hearing.

D. Medical Benefits

Section 7(a) of the Act provides that "the employer shall furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a) (2001). The Board has interpreted this provision to require an employer to pay all reasonable and necessary medical expenses arising from a workplace injury. *Dupre v. Cape Romaine Contractors, Inc.*, 23 BRBS 86 (1989). A claimant establishes a *prima facie* case when a qualified physician indicates that treatment is necessary for a work-related condition. *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 60 (1989); *Pirozzi v. Todd Shipyards Corp.*, 21 BRBS 294, 296 (1988); *Turner v. The Chesapeake and Potomac Telephone Co.,* 16 BRBS 255, 257-58 (1984). The employer bears the burden of showing by substantial evidence that the proposed treatment is neither reasonable nor necessary. *Salusky v. Army Air Force Exchange Service*, 3 BRBS 22, 26 (1975)(stating that any question about the reasonableness or necessity of medical treatment must be raised by the complaining party before the ALJ).

As Claimant suffers from a compensable hearing loss injury under the Act, I find he is also entitled to reasonable and necessary medical expenses related to said loss.

E. Interest

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. *Avallone v. Todd Shipyards Corp.*, 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, *aff'd in pertinent part and rev'd on other grounds, sub nom*. *Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *See Grant v. Portland Stevedoring Company, et al.*, 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

F. Attorney's Fees

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I enter the following Order:

1. Employer shall pay to Claimant permanent partial disability compensation pursuant to Section 908(c)(13) of the Act based upon an 18.4% loss of hearing and a stipulated average weekly wage of $818.75.

2. Employer shall pay Claimant for all past and future reasonable medical care and treatment arising out of his work-related injuries pursuant to Section 7(a) of the Act.

3. Employer shall pay Claimant interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated at a rate equal to the 52-week U.S. Treasury Bill Yield immediately prior to the date of judgment in accordance with 28 U.S.C. §1961.

4. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

A

CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE